

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

TROY ANTHONY BARLOW,
Defendant-Appellant.

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Supreme Court No. 124965

Court of Appeals No. 239038

37th Circuit Court No. 01-2179 FH

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

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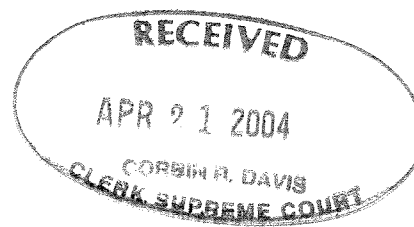


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SUPPLEMENTAL STATEMENT OF JURISDICTION

This brief is being filed pursuant to this Court's order, dated March 25, 2004, allowing for the filing of supplemental briefs within 28 days of that order. Pursuant to MCR 7.209(G)(1): "The Court may grant or deny the application, enter a final decision, or issue a peremptory order. There is no oral argument on applications unless ordered by the Court. The clerk shall issue the order entered and mail copies to the parties and to the Court of Appeals clerk."

COUNTER-STATEMENT OF QUESTIONS

- I. THERE WAS SUFFICIENT EVIDENCE OF FORCE OR COERCION, AS DEFINED BY THE STATUTE, FOR THE JURY TO FIND THAT DEFENDANT WAS GUILTY OF CRIMINAL SEXUAL CONDUCT IN THE FOURTH DEGREE?**

Plaintiff-Appellee answers, "Yes."

Defendant-Appellant answers, "No."

The trial court answered, "Yes."

The court of appeals answered, "Yes."

SUPPLEMENTAL STATEMENT OF FACTS

Plaintiff-Appellee incorporates by reference the Counter-Statement of Facts set forth in the People's brief in opposition to Defendant-Appellant's application for leave to appeal and will discuss material facts within the argument section below.

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE OF FORCE OR COERCION, AS DEFINED BY THE STATUTE, FOR THE JURY TO FIND THAT DEFENDANT WAS GUILTY OF CRIMINAL SEXUAL CONDUCT IN THE FOURTH DEGREE.

Standard of Review:

When reviewing a claim of insufficient evidence to support the conviction, the court views the evidence in the light most favorable to the prosecution and determines whether any rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. People v Johnson, 460 Mich 720, 723; 597 NW2d 73 (1999) (citing People v Wolfe, 440 Mich 508, 515; 489 NW2d 748 (1992) [*amended on other grounds* 441 Mich 1201 (1992)]).

Discussion:

The Court of Appeals summarized Defendant's argument as follows: "defendant argues that the complainant never showed unwillingness to participate in the sexual contacts in the bathroom or the kitchen, that there was no evidence to establish that he coerced or exercised any reasonable force on her and that the complainant's fear was not reasonably foreseeable to him." Barlow, unpublished slip op. at 2. It remains the People's position that the jury had sufficient evidence to conclude that Defendant perpetrated a sexual assault upon Ms. Schaeffer, and the jury's verdict should remain intact. However, there are two main issues of relevance, should this Court grant Defendant's application for leave to appeal to consider his question presented.

First, when defining the force or coercion element for criminal sexual conduct in instances such as the case at bar, the burden should not fall on the victim to disprove a consent or innocent mistake defense. Second, a post-conviction finding that the victim's fear was not reasonable, the basis of Defendant's argument, essentially translates into a probe into the jury's

credibility determination.

The statute in question, MCL 750.520e(1) states, in pertinent part that a person is guilty of fourth-degree criminal sexual conduct when:

(b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) *When the actor coerces the victim to submit by threatening to use force or violence against the victim, and the victim believes that the actor has the present ability to execute that threat.*

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute that threat. As used in this subparagraph, “to retaliate” includes threats of physical punishment, kidnapping, or extortion. . .

(v) When the actor achieves the sexual contact through concealment or the element of surprise.

(c) The actor knows or has reason to know that the victim is mentally incapable, mentally handicapped, or physically helpless. . .

MCL 750.520e(1)(b)(i),(ii),(iii),(v); (1)(c) (emphasis added).

The Court of Appeals has discussed the meaning of coercion as contemplated by the fourth-degree criminal sexual conduct statute. “Coercion may be actual, direct, or positive, as where physical force is used to compel act against one’s will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse.” People v Premo, 213 Mich App 406, 410-411; 540 NW2d 715 (1995) [*lv den* 450 Mich 891, 952; 539 NW2d 511, 560 (1995), *recon den* 549 NW2d 572 (1996)] (quoting Black’s Law Dictionary, 5th ed., 234). The dictionary definition for coercion further states:

As used in testamentary law, any pressure by which testator’s action is restrained against his free will in the execution of his testament. ‘Coercion’ that vitiates

confession can be mental as well as physical, and question is whether accused was deprived of his free choice to admit, deny, or refuse to answer.

Black's Law Dictionary, 6th ed., 258.

The definition of force or coercion as applied to criminal sexual conduct cases should not be limited to positive or violent altercations. The burden should not fall on the victim to disprove a consent or innocent mistake defense. This invariably will become the case in the situation as the case at bar. There has been some discussion on this particular issue in various academic journals. One author utilizes contract law terminology to make the "comparison between rape law and contract law suggest[ing] a possible reform of the force standard in rape law [which] . . . would provide a new definition of rape that forbids non-physical coercion and at the same time is neither over- nor under-inclusive." Ann T. Spence, A Contract Reading of Rape Law: Redefining Force to Include Coercion, 37 Colum. J.L. & Soc. Probs. 57 (Fall, 2003).

Another article discusses dangers inherent in the interpretation of the words force or coercion, and as applied to the Michigan statute in particular:

[R]ape is most assuredly not the only crime in which consent is a defense; but it is the only crime that has required the victim to resist physically in order to establish nonconsent. . . Both the resistance requirement and the mens rea requirement can be used to enforce a male perspective on the crime, but while mens rea might be justified as protecting the individual defendant who has not made a blameworthy choice, the resistance standard requires women to risk injury to themselves in cases where there may be no doubt as to the man's intent or blameworthiness. . . The Michigan's statute emphasis on force or coercion attempts to shift the focus of rape prosecutions from what the victim does or does not do (consent or resist) to the actions of the defendant. . . Beyond the problems of poor draftmanship, the Michigan statute does not meaningfully expand our notions of force or threat. . .

* * *

The first and most basic definition of force or coercion 'when the actor overcomes the victim through the actual application of physical force'. . invites application not only of the traditional. . definition of force, but also the traditional requirements of nonconsent. . . [M]oreover, the subsequent definition of force wholly ignores the reality illustrated by the cases - - that coercion of a woman need not involve either actual violence or threats of future physical injury. . .

Susan Estrich, Rape, 95 Yale Law Journal 1087, 1155 (May, 1986).

In this latter article, the author discusses a Maryland case with facts similar to the case at bar where the court on appeal addressed whether the complaint was reasonably afraid. In this example, “[a]ll told, twenty-one judges, including the trial judge, considered the sufficiency of the evidence. Ten concluded [the defendant] was [guilty]. Eleven concluded that he was not.” Id. at 1113-1114. This disparity is a reflection of the danger in imposing one’s standard of reasonableness on to a victim, in particular a sexual assault victim of the so-called “non-traditional” rape, i.e., of a coercive type situation, or an acquaintance rape situation. However, this Court will not weigh the credibility of the witnesses on appeal or interfere with the jury’s function in weighing evidence and making determinations on witness credibility. People v Wolfe, 440 Mich 508, 514; 489 NW2d 748 (1992), *amended on other grounds* 441 Mich 1201 (1992). In other words, though it is often tempting to be a Monday morning quarterback, it is not fair to do so because the person utilizing hindsight to analyze a situation is not experiencing the event at the time it is occurring, which very well may change how one would react or what one would do under the same circumstances.

The fact is Ms. Schaeffer found herself in a walk-up apartment, late on a winter’s night, in an unsafe neighborhood far from her home, with three older, strange men after her friend left her there. Defendant groped her and then told her to get naked and come out to the kitchen where all three men were. Defendant even testified he thought Ms. Schaeffer was timid: “She appeared timid, you know, kind of just being there, but not scared.” (JT III 37). The jury did not believe Defendant when he testified that Ms. Schaeffer, a timid girl who was “kind of just being there” suddenly decided to strip in front of three strange men while they looked on and laughed at her and that this was fun for her. The jury was in the best position to determine whose testimony

was worthy of belief. Granting Defendant relief, based on his argument that Ms. Schaeffer's fear was not reasonable, could set dangerous precedent, requiring the prosecution to defend complainants of sexual assault as opposed to proving a case of sexual assault.


PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Appellee prays that this Honorable Court deny Defendant-Appellant's request for relief.

Respectfully submitted,

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DATED: April 20, 2004

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PROOF OF SERVICE
(Service by Mail)

STATE OF MICHIGAN)
) ss.
COUNTY OF CALHOUN)

Georgia G. Cordrey, being first duly sworn, deposes and states:

That on April 20, 2004, she served a photocopy of Plaintiff-Appellee's Brief on Appeal and a photocopy of the Proof of Service upon:


MR DOUGLAS W BAKER
ASSISTANT DEFENDER
645 GRISWOLD 3300 PENOBSCOT BLDG
DETROIT MI 48226-4281

by mailing each of said documents in an envelope bearing first-class postage fully prepaid to Appellate Defense Attorney Douglas W. Baker, Assistant Defender, at his address of record.

Further, deponent saith not.


Georgia G. Cordrey - Deponent

Subscribed and sworn to before me this 20th day of April, 2004.


Notary Public, Calhoun County, Michigan
My commission expires: 08-26-07